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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition for Declaratory Ruling and)
Rulemaking with Respect to Defining,) RM-9345
Predicting and Measuring "Grade B)
Intensity" for Purposes of the)
Satellite Home Viewer Act)

COMMENTS OF COSMOS BROADCASTING, INC.
AND COX BROADCASTING, INC.
CONCERNING THE FILING OF THE ECHOSTAR PETITION

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September 25, 1998

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Summary

In enacting the Satellite Home Viewer Act ("SHVA"), Congress crafted a narrow exception to the Copyright Act to permit the delivery of network programming by satellite to those relatively few households that cannot receive a signal of that network's local broadcast affiliate television station. The statute embodies Congress' reasoned determination as to how best to balance copyright protection with the need to provide more complete distribution of network programming to rural America. The limited nature of this copyright exception reflects the grave policy concerns expressed by both Congress and the Commission about the effect of imported network programming on the continued vitality of localism and local affiliates. As such, the SHVA reflects Congress' public interest judgment as to the manner in which the competing interests of rural families, local affiliates, the satellite industry and the public at large can be accommodated most equitably.

In contrast to Congress, the Commission is vested with a narrow public interest mandate. This mandate allows the agency to set communications policy within certain parameters. It does not permit the Commission to substitute its own judgment on issues already addressed -- and resolved -- by Congress when it enacted the SHVA. Even a perceived need to promote competition to cable cannot justify the agency's redefinition of terms adopted by Congress to delineate the extent of the satellite compulsory license.

After watching two recent federal courts demand compliance with the SHVA by its former program supplier, EchoStar now requests that the Commission initiate a rule making that would alter radically the SHVA exception by redefining the Grade B standards adopted by Congress. Because the Commission lacks the legal authority to rewrite the SHVA, the

relief requested by EchoStar cannot be granted. Moreover, the FCC would not advance any public interest objectives within its jurisdiction by modifying its Grade B prediction methodology because the FCC's prediction model has no relevance to the determination of subscriber eligibility under the SHVA. Revising the agency's Grade B measurement standards would shrink artificially local affiliates' television markets and permit the widespread satellite delivery of out-of-market network programming throughout the service area of local stations. These changes, in turn, would undermine the Commission's statutory duty to promote localism while also threatening the network-affiliate relationship, contrary to the expressed will of Congress. Law, equity and the public interest all require the Commission to dismiss EchoStar's petition.

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Cosmos Broadcasting, Inc. and Cox Broadcasting, Inc. (collectively, "Joint Broadcasters"), by their attorneys, hereby submit these Comments concerning the petition for declaratory ruling and rulemaking filed by EchoStar Communications Corporation ("EchoStar"). In its petition, EchoStar seeks the FCC's aid in effectively reversing the decisions of two federal courts that found rampant, willful and repeated violations of the Satellite Home Viewer Act ("SHVA") by EchoStar's former program supplier, PrimeTime 24. Rewriting the SHVA, however, would harm the public interest by undermining the valid public interests in protecting both copyright holders and local network-affiliated broadcast stations. As such, Joint Broadcasters, as the owners of numerous network-affiliated broadcast television stations, would be affected adversely by the rewriting of the SHVA requested by EchoStar. Moreover, the public interest requires the Commission to insist on the same strict adherence to the SHVA by EchoStar demanded by two federal district courts. Accordingly, Joint Broadcasters urge the Commission to dismiss the EchoStar petition.

Introduction

The direct-to-home satellite industry began in late 1979 when the Commission removed mandatory licensing procedures for domestic receive-only earth stations.^{1/} The industry grew rapidly in response to the agency's action. In fact, by the time the Commission first addressed the issue of satellite-delivered network signals in the mid-1980's, over one and one-half million households already owned home satellite dishes.^{2/}

In an effort to protect their investments in programming, a number of satellite programmers announced plans in the mid-1980's to scramble their signals and require satellite dish owners to purchase descrambling equipment.^{3/} Congress responded with hearings and legislative proposals concerning the issue.^{4/} Representative Billy Tauzin and others introduced a bill that would have amended the Communications Act to create an FCC-administered compulsory copyright license for private viewing of scrambled signals.^{5/} H.R. 1840 and its companion bill in the Senate, S. 1618, would have permitted the Commission to set prices, terms and conditions for the receipt of satellite signals by home dish owners. The U.S. Copyright Office, however, opposed such a scheme. During hearings on H.R. 1840, subcommittee chairman Robert Kastenmeier announced his agreement with the Copyright Office and declared

^{1/} *Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 FCC 2d 205 (1979).

^{2/} *See Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, 2 FCC Rcd. 1669, ¶¶ 2 (1987) ("Scrambling Report").

^{3/} *Id.*

^{4/} *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the Registrar of Copyrights, March 1992, at 97.

^{5/} *Id.*

that any compulsory license should be "in the context of the copyright laws and not in an external regulation by the FCC."^{6/} Accordingly, Congress did not amend the Communications Act or invest the FCC with authority to administer a satellite compulsory license. Instead, Congress merely directed the Commission and the National Telecommunications and Information Administration ("NTIA") to investigate further and report on the terms and conditions under which programmers were providing scrambled programming to direct-to-home satellite customers.^{7/}

Among the issues addressed by the Commission in the resulting report was the scrambling of broadcast network satellite communications.^{8/} Satellite interests urged the FCC to require networks to make network feeds^{9/} available to dish owners primarily to provide network programming to those who reside in "white areas."^{10/} The Commission expressed a concern, however, that off-satellite viewing of network programs would permit consumers to view programming, including prime-time network programs and sporting events, not intended for distribution in every market and/or at more than one time per day. Permitting network feeds by satellite consequently would mean the loss by local affiliates of "some two-thirds of the 1.6

^{6/} *Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 78 (Nov. 20, 1985) (Statement of Chairman Robert W. Kastenmeier).

^{7/} *Scrambling Report*, 2 FCC Rcd. at ¶ 2.

^{8/} *Id.* at ¶¶ 145-202.

^{9/} Network feeds consists of both regular program transmissions and nonprogram transmissions (such as internal and administrative communications and unedited news stories).

^{10/} The "white areas" refers to those locations that "lack[] off-air network television service." *See Scrambling Report*, 2 FCC Rcd at ¶ 146.

million HSD owners [who] have network service available, either off-air or through cable."

Because this loss would disrupt needlessly the "efficiency of network-affiliate relationships," the FCC rejected the satellite industry's request for access to network feeds.^{11/}

The Commission warned in that same report that the proposal of Satellite Broadcasting Networks, Inc. ("SBN") to deliver by satellite the signals of an affiliate of each of the major networks through a retail package called "Prime Time 24" also "raise[d] very serious legal and policy concerns."^{12/} SBN indicated that it would provide this service nationwide, while insisting that it could proceed without the consent of the networks or their affiliates through the cable compulsory copyright license.^{13/} The FCC could not find any support for SBN's assertion in the language or legislative history of the 1976 copyright revision act. The Commission nevertheless observed that, even if SBN could overcome the copyright issues, the retransmission of out-of-market signals raised serious communications policy issues:

The network-affiliate relationship plays an important role in supplying the public with television service. This system of distribution, which is based on program rights ownership and copyright protection, a system of exclusive broadcast outlets, and contractual relationships among the parties, is totally by-passed through the direct-to-home satellite distribution mechanism of the type proposed by SBN and by others which involves no contractual or consensual arrangement of any type with either the program owners, the networks, or the broadcast stations whose signal is used. Thus,

^{11/} See *id.* at ¶ 197. The Commission also concluded that Section 705 of the Communications Act prohibited the unauthorized interception of satellite network feeds by home satellite dish owners. *Id.* at ¶¶ 193-97.

^{12/} *Id.* at 200.

^{13/} *Id.* at 183; 17 U.S.C. § 111. The U.S. Copyright Office later rejected this argument. Instead, it concluded that SBN's satellite-delivered "Prime Time 24" service did not qualify for the cable compulsory license and, therefore, the delivery of out-of-market signals constituted a violation of the Copyright Act. Cable Compulsory License; Definition of Cable Systems, Fed.Reg. 31,580 (1991).

although they cannot be resolved here, we remain concerned with the policy implications that such satellite operations raise.^{14/}

Ultimately, Congress balanced the competing public interests of providing network signals to those families residing in "white areas" with the need to preserve the critical network-affiliate relationship by crafting a narrow exception to the exclusive copyrights owned by networks and affiliates through the Satellite Home Viewer Act, 17 U.S.C. § 119.^{15/} In particular, the SHVA permits delivery of network programming by satellite to those subscribers who reside in "unserved households." Congress defined an "unserved household" as one that (1) cannot receive a signal of at least a "Grade B" intensity of the local network affiliate station with a conventional rooftop antenna and (2) has not received the signal of that network via cable within the preceding ninety days.^{16/} Unless a customer satisfies these two criteria, a satellite company has no legal right to deliver the copyrighted material to that customer.

Significantly, Congress rejected a proposal advanced by PrimeTime 24, EchoStar's former program supplier, that would have permitted it to retransmit network signals to any household that merely submitted an affidavit claiming that it did not receive adequate network service.^{17/} In short, PrimeTime 24 repeated to Congress its earlier argument to the FCC -- that it should be able to retransmit network signals without the consent of the copyright owners to virtually any household that did not satisfy a subjective picture quality standard. Although

^{14/} *Id.* at 201.

^{15/} *ABC, Inc. v. PrimeTime 24, Joint Venture*, 1998 U.S. Dist. LEXIS 13308, *12 (M.D.N.C. July 16, 1998).

^{16/} 17 U.S.C. § 119(d)(10).

^{17/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *31; *CBS Inc. v. PrimeTime 24 Joint Venture*, 1998 U.S. Dist. LEXIS 8533, *30 (S.D. Fla. May 13, 1998).

Congress rejected this proposal, PrimeTime 24 and its distributors (including EchoStar), essentially have employed this test when selling service to subscribers.^{18/}

After years of attempting unsuccessfully to obtain PrimeTime 24's compliance with the federal statute, broadcasters brought copyright infringement actions against the company. Two federal courts have rendered their decisions; both rejected PrimeTime 24's subjective picture quality standard and concluded that the company violated the statutory restrictions willfully and systematically.^{19/}

In response, the satellite industry has launched a vigorous public relations campaign which denounces the federal courts, this Commission and local broadcasters for "taking away" their customers' network signals and "deciding which TV channels you are allowed to watch."^{20/} As part of this campaign, the satellite interests promote the misguided view that the FCC effectively could advance competition to cable by rewriting the copyright statute. In fact, the only proper forum for such action is Congress and, indeed, efforts already have begun to address

^{18/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *31 ("Although PrimeTime knew of the governing legal standard, it nevertheless chose to adopt one it found more convenient. ... PrimeTime has simply ignored the Grade B test even though it tried and failed to persuade Congress to adopt a test of eligibility based upon subscriber declarations about over-the-air reception"); *CBS Inc.*, 1998 U.S. Dist. LEXIS 8533, at *32.

^{19/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *32-33 ("No reasonable fact finder could fail to find that PrimeTime's actions constitute a pattern and practice of statutory violation"); *CBS, Inc.*, 1998 U.S. Dist. LEXIS 8533, at *33 (concluding that the evidence supported a finding that PrimeTime 24 had "willfully and repeatedly rebroadcast copyrighted network programming to served households in violation of the SHVA"). A third lawsuit alleging similar claims against *PrimeTime 24* remains pending before a federal court in Amarillo, Texas.

^{20/} See, e.g., <<http://www.tvaccessnow.com>>. See also Comments of The National Affiliated Stations Alliance in RM No. 9335 at 14.

this concern through legislative proposals that would authorize the retransmission of local broadcast signals into local markets (the so-called "local-into-local" initiatives).

In the instant proceeding, EchoStar attempts to relitigate the same arguments rejected by both federal courts. It then requests nothing less than the Commission's rewriting of the copyright statute by redefining the Grade B standards adopted by Congress. These radical changes, if granted, would permit EchoStar to accomplish the widespread and indiscriminate distribution of copyrighted material, despite the Commission's previously expressed policy reservations supporting the public interest value of the network/affiliate distribution system, and despite Congress' explicit rejection of such a scheme.

I. The FCC May Not Alter the Balance Congress Struck Between Fostering Creativity and Protecting the Rights of Artists in Their Works.

Envisioning the need for a system to encourage artistic and scientific creation, the framers of the Constitution specifically gave Congress the power "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."^{21/} The copyright scheme sanctions the creation and legal enforcement of a monopoly of limited duration in the exhibition of creative works, despite any adverse effects this monopoly may have on competition, because the grant of a limited monopoly furthers the public interest by encouraging competition in a broader sense.^{22/} By prohibiting the unauthorized duplication of a work, copyrights promote the independent

^{21/} U.S. Const. art. I, § 8, cl. 8.

^{22/} See generally, *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

creation of additional competitive works.^{23/} The founders recognized this profound public interest, and administrative agencies and private parties should not ignore their wisdom simply to advance other interests. EchoStar's claim that the SHVA is anti-competitive and anti-consumer reveals a stunningly narrow and misguided understanding of the nexus between copyright laws and competition.

Copyright laws enable the Washington Post Company, for example, to avail itself of the government's aid in stopping the wholesale copying and retail distribution of the *Washington Post*. This would be true even though a "competing" distributor would be advancing the otherwise apparently valid public interest goal of attempting to compete in the local newspaper market. Similarly, it would be illegal for the *Wall Street Journal* to publish an article commissioned by the *Post* on the day before the *Post* intended to run that story.^{24/} The *Journal* could not escape copyright liability by arguing that its conduct advanced the public interest by providing information to the public in a more timely or convenient manner. The consumer may even see a drop in prices if either "competitor" were to take these actions -- but only until the economic incentive to develop the original content dries up and the *Post* ceases to exist altogether. Congress (and the founders) understood this tension between protecting investment in a creative work and ensuring that work's widespread distribution by "competitors"; the

^{23/} See Robert A. Gorman and Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials* 15 (4th ed. 1993).

^{24/} See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985) ("Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by preempting the right of first publication"); *Int'l News Service v. Associated Press*, 248 U.S. 215 (1918).

copyright laws therefore reflect Congress' determination as to the proper balance between these competing aims.

Although the technology at issue in the instant proceeding differs from that of newspapers, the legal protections and mechanisms are identical. Joint Broadcasters have been licensed the right to distribute network programming within their local markets. EchoStar holds no right to distribute out-of-market network programming to households within the market of a television station owned by the Joint Broadcasters and affiliated with the same network. In fact, EchoStar has no more authority to do so than the "competitors" that would distribute copies of the *Washington Post* or publish advance copies of the *Post*'s articles.

In enacting copyright legislation, Congress already performed the necessary balancing of competing public interests and defined the equilibrium that will result in the greatest public benefit. Congress' authority to make these public interest judgments does not depend upon the technology at issue.^{25/} As a result, the FCC need not and, indeed, cannot revisit or rebalance the public interest judgments made by Congress when it added Section 119 to the Copyright Act.^{26/} Simply stated, the Commission lacks the legal authority to rewrite the SHVA by redefining those defined terms expressly adopted by Congress in the statute, even if the FCC were to conclude

^{25/} *Sony Corp.*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology").

^{26/} *See Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989) ("Either way, we cannot countenance the Commission's attempt to rewrite the statute"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite this statute").

that a different copyright regime might better promote competition to cable or serve some other public interest.^{27/}

The FCC cannot ignore the clear intention of Congress when it enacted the copyright statute.^{28/} Two federal courts already have concluded that Congress meant to permit only the very limited provision of satellite-delivered network signals.^{29/} To give effect to that narrow exception, Congress adopted the FCC's Grade B signal intensity test set forth in Section 73.683 of the Commission's Rules. As the federal court in Raleigh, North Carolina, recently stated:

Although Section 73.683(a) concededly was drafted with other purposes in mind, Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant in defining a new statutory term. It is apparent that Congress has done so here. SHVA's reference to 'an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)' most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel.^{30/}

If Congress had intended for the Commission to redefine its Grade B rules, it would have ordered the agency to do so or expressly given the agency the ability to do so, just as it has done

^{27/} *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995) ("The Commission is not free to circumvent or ignore that [policy] objective. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation").

^{28/} *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect") (citations omitted).

^{29/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308; *CBS, Inc.*, 1998 U.S. Dist. LEXIS 8533.

^{30/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *14.

in other contexts.^{31/} An attempt by the Commission to modify the applicability of the SHVA by redefining definitions adopted by Congress would conflict with the expressed intentions of the legislature and clearly exceed the agency's legal authority.

In adopting the Commission's Grade B standards for SHVA purposes, Congress not only balanced the competing public interest objectives inherent in any copyright statute. It also expressly balanced the competing interests of unserved households and television stations when it adopted the Commission's existing Grade B definitions. As a result, even the most compelling public interest objectives would not justify the rewriting of Section 119 of the Copyright Act by the Commission. Because the FCC lacks the authority to grant the relief sought by EchoStar, the Commission should dismiss the petition.

II. The Public Interest Would Be Served by Dismissing EchoStar's Petition.

A. Because the FCC's Prediction Method Has No Relevance to Determining Compliance with the SHVA, EchoStar's Request to Redefine the Commission's Model Would Waste Scarce Agency Resources.

EchoStar makes much of the various methods for predicting the extent of a television station's Grade B coverage area. EchoStar laments that many years ago -- long before the enactment of the SHVA -- the Commission, for administrative efficiency, adopted a theoretical prediction model for use throughout the country that ignored terrain abnormalities and that

^{31/} For example, "[i]n adopting the lottery statute that governs the processing of LPTV applications, Congress stated that it expected the FCC to employ the traditional 'substantially complete' standard *unless* the agency adopted another standard by rule." *Salzer v. FCC*, 778 F.2d 869, 873 (D.C. Cir. 1985) (*citing* H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 39 (1982), which states, "The conferees expect that the Commission will use the standards for acceptability set out in *James River* . . . unless, by rule, it has adopted or shall adopt different standards"). Moreover, the SHVA itself directed the Commission to initiate an inquiry and rule making proceeding concerning syndicated exclusivity rules for satellite carriers. H.Rept. No. 100-887 (II) at 26.

specified 50/50 propagation criteria.^{32/} EchoStar proposes that the FCC modify its rules for the purpose of implementing the SHVA to specify that a predicted Grade B coverage area includes only those points at which ninety-nine percent of the locations receive a predicted Grade B signal ninety-nine percent of the time, with a ninety-nine percent confidence level.

EchoStar's proposal utterly lacks merit.^{33/} The Commission need not waste its valuable resources entertaining EchoStar's proposal because the FCC's prediction methodologies have no relevance to determining compliance with the SHVA. Congress adopted an eligibility scheme in the SHVA pursuant to which a particular subscriber would qualify for out-of-market network signals if the actual intensity is below the requisite dBu at that customer's residence (and the customer did not subscribe to cable within the previous ninety days).^{34/} Accordingly, it is legally insignificant for purposes of determining subscriber eligibility under the SHVA that a particular unserved household happens to be located within a station's Grade B coverage area as predicted by the FCC.^{35/}

^{32/} See EchoStar Petition at 3-4, 22-25. EchoStar also attacks the Miami court's decision to utilize the terrain-dependent Longley-Rice model for predicting Grade B coverage areas. *Id.* at 4-6.

^{33/} EchoStar never discusses how this new standard would affect the Commission's broadcast allocation scheme, local ownership rules, or television market modification policies, to name just a few relevant issues. Similarly, EchoStar conveniently fails to mention that such a high standard would result in extremely small predicted Grade B coverage areas.

^{34/} *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *19-22 (rejecting PrimeTime 24's argument that the SHVA did not establish an actual measurement standard); *CBS, Inc.*, 1998 U.S. Dist. LEXIS 8533, at *18-19 (same).

^{35/} A satellite carrier such as EchoStar can comply with the SHVA by testing the intensity of the local network affiliates' signals at the homes of its potential customers. While the carrier may choose a predictive model such as Longley-Rice to make preliminary determinations as to subscriber eligibility, the internal use of such a predictive measurement tool cannot excuse a carrier's copyright infringements. Instead, such a predictive tool merely enables

B. Modifying the Manner in Which the FCC Measures Grade B Would Undermine Congress' Intent to Promote Localism Through a Narrowly Crafted SHVA.

EchoStar also seeks a redefinition of the FCC's Grade B signal intensity measurement procedures.^{36/} Specifically, EchoStar requests that the FCC change its long-standing engineering specifications to require the reception by an indoor television receiver of the outdoor field strength of a particular television station. The tester, EchoStar submits, should disregard the fact that a particular antenna may be pointing away from the station's transmitter and also should ignore the use of several typical antenna components. Not surprisingly, EchoStar wants the FCC to adopt a new measurement scheme that, in essence, would shrink dramatically the size of local television markets and, as a result, permit it to distribute out-of-market signals significantly beyond the "typically rural" areas contemplated by Congress.

This proposal is inconsistent with Section 307(b) of the Communications Act of 1934, which mandates that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient,

the carrier to assess which customers likely would be eligible for out-of-market signals. By choosing a model with a high degree of accuracy, a satellite carrier can reduce significantly and efficiently the number of households it otherwise would have to test. The Longley-Rice model applied in the standard manner specified by the Commission in OET Bulletin 69, for example, could save a carrier's resources because it predicts which households can receive a signal of Grade B intensity with very high accuracy. On the other hand, relying on a model with a low degree of accuracy would underpredict the extent of a station's Grade B coverage area and thus result in a much larger number of SHVA violations. Regardless of which predictive tool it may choose, however, a satellite company may deliver network signals only to those households that actually fail to receive a Grade B intensity off-air signal. There is no justification for expending the FCC's scarce resources to investigate the merits of varying predictive propagation models to assist EchoStar in making what is essentially a business decision.

^{36/} EchoStar Petition at 27-29.

and equitable distribution to each of the same." The Commission consistently has interpreted this provision to require the allocation of television stations to individual broadcast market service areas. Unlike its allocation of AM radio station licenses, for example, television licenses have not been allocated to serve regional or national markets.

The focus on localism and local service constitutes the very core of the broadcast service and, in that manner, distinguishes free over-the-air broadcast service from other communication services regulated by the Commission.^{37/} By ensuring a localized broadcast service, the FCC has afforded consumers the ability to receive news and public affairs programming directed toward individual local needs and interests. As a result, local businesses and politicians are able to communicate with local audiences who benefit from the dissemination of timely local news, events, weather and emergency information.

Congress recognized the inherent value of localism and, as a result, crafted a very narrow exception to the copyright laws for the transmission of non-local broadcast signals by satellite carriers.^{38/} Under the scheme set up by Congress, the only households that would receive satellite-delivered network programming would be those relatively few households that otherwise would not be within the service area of a broadcast network signal off-air and,

^{37/} In this regard, the petitioner misconstrues the deliberate manner in which the Commission allocates radio and television stations to local communities. Instead, EchoStar dismisses the entire allocation scheme and its attendant policies (in which Grade B coverage areas play a pivotal role) as merely a bureaucratic tower-siting exercise. See EchoStar Petition at 1 n.1, 3, 13, 19-21, 23.

^{38/} See, e.g., H. Rept. No. 100-887 (I) at 14, *reprinted in* 1988 U.S.C.C.A.N. 5577 ("the bill respects the network/affiliate relationship and promotes localism").

consequently, could not benefit from the local service offered by television stations.^{39/} As a result, Congress established a limited exception which ensured that the satellite delivery of network programming would not undermine localism.

In contrast to the expressed will of Congress, EchoStar's proposed indiscriminate distribution of network programming thwarts the provision of valuable local programming in the affected affiliate's service area. The provision of illegal service enables subscribers to view programming tailored to a distant market rather than the local programming, public service announcements, and public affairs programs responsive to the needs and interests of their local community. Among other things, these subscribers are deprived of local political debates, press conferences and advertisements from local politicians. They are robbed of coverage of local news and other events. They are denied weather announcements, school closings, traffic alerts, and emergency warnings. They are deprived of commercials for local businesses that, without support from local consumers, are less able to employ local residents.

Every subscriber that views out-of-market network signals, therefore, is opting out of the local dialogue. Because the redefinition of the Commission's Grade B measurement standards as requested by EchoStar would enable it to distribute imported network signals more widely, the requested relief conflicts with the Commission's statutory mandate, the public interest, and the very purpose of the broadcast service.

C. Altering the FCC's Measurement Standard Is Inconsistent With Congress' Expressed Desire to Promote the Network-Affiliate Relationship.

^{39/} See, e.g., H. Rept. No. 100-887 (I) at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577 ("The bill will benefit 'rural America, where significant numbers of farm families are inadequately served by broadcast stations regulated by the [FCC]'").

In addition to preventing defection of local viewers, Congress also strove to protect the network-affiliate relationship:

The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-distribution system.^{40/}

In particular, Congress understood that hundreds of television stations across the country, including those owned by Joint Broadcasters, benefit from contractual relationships with the major broadcast networks. Economies of scale from the affiliate distribution system permit the networks to provide high quality programming. These economies permit the networks to obtain popular programming otherwise beyond the reach of most television stations, especially those located in relatively smaller markets. Local audiences benefit from the relationship of local stations and broadcast networks because they receive a unique and highly desirable package of local and network programming that otherwise would be unavailable.

In order to protect their investments in network programs, the networks own copyrights in those works. Networks, in turn, license their respective affiliates to exhibit this programming within each affiliate's local market. These copyright licenses provide the critical incentive for the local affiliate to invest in the promotion and protection of the network image or "brand" and its programming within the local market. A strong affiliate will benefit the network by providing popular local programming and engaging in local promotional efforts that deliver local audiences for network programming. These local efforts enhance the network's "good will," expand its audience and advertising revenue, and enable the network to secure more desirable high-quality programming.

^{40/} See, e.g., *id.* at 19-20; see also *ABC, Inc.*, 1998 U.S. Dist. LEXIS 13308, at *12.

If other parties also had the right to distribute network programming within a local market, network affiliates would have far less incentive to promote the network or to provide high-quality local programming.^{41/} In fact, the illegal importation of network signals allows households within the market of an affiliate to watch network programming not broadcast by the local station. Each illegal customer dilutes the value of each network program for which the local affiliate contracted. Each of these illegal customers subtracts from that affiliate's local audience and, consequently, reduces the affiliate's local and national advertising revenue.^{42/} In the aggregate, affiliates have suffered an irreparable injury as PrimeTime 24 and other satellite carriers rampantly provide illegal out-of-market signals to subscribers residing within the service area of local network-affiliated stations.^{43/}

Every illegal subscriber undermines the ratings, revenue and value of his or her local network affiliates. As such, the illegal importation of network signals threatens the public interest benefits that result from strong local television stations and from the efficiencies of the exclusive network-affiliate distribution system -- in direct conflict with the clear objective and intent of Congress.

The requested redefinition of the Grade B measurement standards would reduce significantly the size of a local television station's service area. The requested relief, therefore.

^{41/} *Scrambling Report*, 2 FCC Rcd. at ¶ 159 ("In the absence of an exclusive distribution system, these incentives are attenuated because other distributors that did not share the costs of promotion would nevertheless benefit from it").

^{42/} *See id.* at ¶ 197 ("The record reveals that some two-thirds of the 1.6 million HSD owners have network service available, either off-air or through cable. Satellite viewing could mean the loss of many of these homes by the local affiliate in audience ratings for both national and local purposes and a corresponding reduction in revenues from both sources").

^{43/} *See CBS Inc.*, 1998 U.S. Dist. LEXIS 8533, *37.

would produce the same adverse results that flow from the satellite carriers' widespread violations of the SHVA. The Commission accordingly must follow Congress' lead in "respecting the public interest in protecting the network-distribution system" by dismissing EchoStar's petition.

Conclusion

EchoStar argues that the Commission must now redefine the manner in which the agency has predicted and measured a television station's Grade B signal in order to make it easier for EchoStar to distribute its service indiscriminately across the country. Congress has already heard these arguments. Instead of permitting widespread delivery of network signals by satellite, Congress determined that the broad public interest would best be served by crafting a narrow exception to the copyright laws to meet the needs of rural "white area" households. By adopting the FCC's Grade B standards, Congress selected what it believed to be the proper balance between protecting localism and the network-affiliate relationship with the eagerness of companies like EchoStar to provide imported network signals to anyone willing to pay for the service.

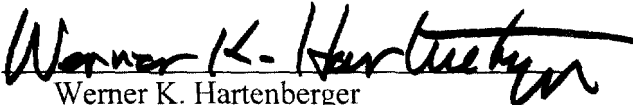
In contrast, the Commission is charged with a narrow public interest mandate. This mandate, among other things, does not authorize the agency to revisit the manner in which Congress balanced competing interests when it adopted the copyright statute. Accordingly, even promotion of the perceived need to promote alternatives to cable cannot justify the agency's redefinition of defined terms expressly adopted by Congress. Not only would the public interest not be served by a grant of EchoStar's requested relief, it would be affirmatively harmed by undermining the valid public interest in promoting localism and strong local affiliates.

In fact, the opposite is now required: The Commission should direct its efforts toward rebuilding the strength and value of local broadcast stations, restoring the efficiencies of the network-affiliate relationship, and expanding the provision of local television service to all consumers within a local television market. These objectives -- each of which clearly lies within

the agency's mandate -- can be achieved by dismissing EchoStar's petition. This action would evidence the Commission's rededication to the Communications Act and send a message to the satellite industry that the Commission unequivocally supports Congress' public interest determinations and the demand by two federal courts for immediate compliance with the SHVA.

Respectfully submitted,

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September 25, 1998

CERTIFICATE OF SERVICE

I, Vanese E. Hargrove, hereby certify that I sent a true and correct copy of the foregoing "Comments of Cosmos Broadcasting, Inc. And Cox Broadcasting, Inc. Concerning the Filing of the Echostar Petition" on this 25th day of September 1998, via first-class United States mail, postage pre-paid, to the following:

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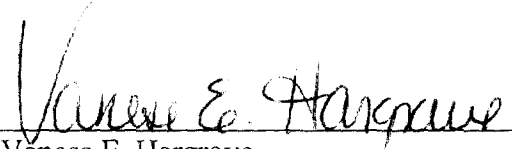
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